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**Date and Time:** Thursday, October 11, 2018 1:17:00 PM EDT

**Job Number:** 75315782

## Document (1)

1. [\*Approval of State Permit Program \(Section 402\(b\)\) Where Division of Authority Exists\*](#)

**Client/Matter:** -None-

**Search Terms:** NPDES and program

**Search Type:** Terms and Connectors

**Narrowed by:**

**Content Type**

Administrative Materials

**Narrowed by**

Sources: Environmental Protection Agency; Sources: EPA  
General Counsel Memoranda

## *Approval of State Permit Program (Section 402(b)) Where Division of Authority Exists*

Approval of State Permit Program (Section 402(b)) Where Division of Authority Exists

United States Environmental Protection Agency

January 24, 1973

### **GENERAL COUNSEL OPINION**

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#### **Core Terms**

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guideline, memorandum, vest, issuance, thermal

#### **Text**

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Your memorandum of December 29, 1972, requests an opinion as to whether a State permit program may qualify for approval under section 402(b) of the FWPCA where more than one State agency has permitting authority. Your memorandum states that in the State of Washington, the Thermal Site Council grants permits for discharges from thermal electric generating stations, although general authority to grant discharge permits is in the Department of Ecology. In Idaho, the Department of Water Administration has authority to permit discharges into wells, although general permitting authority is in the Department of Environmental Protection.

There is nothing in the FWPCA or in the EPA Guidelines published December 22, 1972 (37 FR 28390), that requires all permitting authority to be vested in one State agency in order for the State permit program to obtain Federal approval under section 402(b). The basic requirement of section 402(b) is that "the laws of such State \* \* \* provide adequate authority to carry out the described program." Neither this language, nor any language in section 304(h)(2) or in the EPA Guidelines, indicates that the authority must be vested in a single agency. The several references in the EPA Guidelines to "any State or interstate agency participating in the NPDES" (e.g., §§ 124.21, 124.24, 124.31, 124.34, 124.35) were not intended to preclude a division of permit issuance authority as described in your memorandum. Accordingly, in my opinion the division of permit issuance authority described in your memorandum among more than one State agency would not prevent Federal approval of the State permit program under section 402(b).

Your memorandum also asks whether, if more than one State agency may have permitting authority, must all the authority described in the EPA Guidelines must be vested in each agency. In determining whether all the authority described in the EPA State permit program guidelines must be vested in each State agency authorized to issue permits, the key question is whether any sharing of authority which is permitted will operate to detract from the overall effectiveness of the State's permit program. This clearly will be a case-by-case determination. I suggest that as a minimum the Attorney General when writing his opinion as required under section 402(b) of the FWPCA, identify those instances where the second agency does not have its own statutory authority or procedure for carrying out an activity required under the Act or the Guidelines. In each of these instances the letter should indicate how the second agency will coordinate with the primary permit issuing agency to accomplish the task required (e.g., monitoring or enforcement). In addition, the letter should state that no conflict of authorities exists which would preclude the effective operation of the permit program for those permits issued by the second agency (e.g., legislation requiring specific matters to be taken into account with respect to power plant discharges that may be at variance with effluent standards and limitations under the FWPCA; requirements for board membership which violate the conflict of interest clauses in section 304(h)(2)(D) of the FWPCA).

**Load Date:** 2013-03-08

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Approval of State Permit Program (Section 402(b)) Where Division of Authority Exists

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